

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
8022-g76LJ BY ROSS L. BAIR)

The Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order as entered by the Hearing Examiner on September 16, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Final Order.

FINAL ORDER

1. Subject to the conditions and limitations listed below, Application for Beneficial Water Use Permit No. 8022-g76LJ by Ross L. Bair is hereby granted to appropriate 600 gallons per minute of water, not to exceed 300 acre-feet per annum, in Flathead County, Montana, to be diverted by means of a well approximately 293 feet deep at a point in the SW1/4 NE1/4 SE1/4 of Section 28, Township 30 North, Range 20 West, M.P.M., and used for new irrigation on 63 acres in the W1/2 SW1/4 of Section 27, and 57 acres in the E1/2 SE1/4 of Section 28, Township 30 North, Range 20 West, M.P.M., for a total of 120 acres, more or less, from April 15 to October 15, inclusive, of each year.

2. Provisional Permit No. 8022-g76LJ is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana law.

3. The Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all the waters diverted including the period of time and shall submit

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1 said records to the Department upon request.

2 4. The Permittee shall limit his diversion of water from the well
3 to a maximum of 16 hours per day.

4 5. The issuance of this Provisional Permit by the Department in no
5 way reduces the Permittee's liability for damages caused by the Permittee's
6 exercise of this Provisional Permit, nor does the Department in issuing
7 the Provisional Permit in any way acknowledge liability for damage
8 caused by the Permittee's exercise of this Provisional Permit.

9 NOTICE

10 The Hearing Examiner's Final Order may be appealed in accordance
11 with the Montana Administrative Procedures Act by filing a petition in
12 the appropriate court within thirty (30) days after service of the Final
13 Order.

14 DATED this 1st day of October 1980.

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17 *David L. Pengelly*
18 DAVID L. PENGELLY, D.N.R. & C.
19 HEARING EXAMINER
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EXHIBIT "A"
STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.
8022-g76LJ BY ROSS L. BAIR

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FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on March 31, 1978 by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order, except that the Proposed Order is hereby modified by adding new items 4, 5, and 6.

FINAL ORDER

1. Subject to the conditions cited below, the Application for Beneficial Water Use Permit No. 8022-g76LJ by Ross L. Bair is hereby granted to appropriate 1.34 cubic feet of water per second or 600 gallons per minute, and not to exceed 300 acre-feet per annum in Flathead County, Montana, to be diverted by means of a well approximately 293 feet deep at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, Township 30 North, Range 20 West, M.P.M., and used for new irrigation on 63 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 27 and 57 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 28, Township 30 North, Range 20 West, M.P.M., for a total of 120 acres, more or less, from April 15 to October 15, inclusive, of each year.

2. The permit is temporary and is subject to all prior existing water rights in the source of supply including prior decreed rights, if any, and not necessarily limited to all existing water rights of those objecting herein, and subject to any final determination of prior existing water rights, as provided by Montana law.

3. The Temporary Permit is subject to the following additional conditions:

- a. The Temporary Permit shall terminate on October 31, 1979 unless terminated sooner by Department Order.
- b. The Permittee and Objectors shall cooperate with the Department in conducting a monitoring program of potentially affected wells in the area. The monitoring program will

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 8022-g76LJ BY ROSS L. BAIR)

* * * * *

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on June 26, 1980, at Columbia Falls, Montana, to hear objections to Application for Beneficial Water Use Permit No. 8022-g76LJ, David Pengelly, Hearing Examiner, presiding. This hearing is a continuation of a hearing held on October 26, 1977, at Kalispell, Montana, before Hearing Examiner, William F. Throm. Following the initial hearing in the above matter, a Proposed Order was issued on March 31, 1978, and a Final Order was issued on June 12, 1978 directing the Department to issue a Temporary Permit to the Applicant. The Temporary Permit expired on October 31, 1979. The continuation of the hearing was held for the sole purpose of gathering additional information for use in determining whether or not to grant a Provisional Permit to the Applicant.

The Applicant, Ross L. Bair, appeared at the hearing and presented testimony in support of the Application. Mr. Bair was not represented by legal counsel, nor did he introduce any exhibits supporting the Application.

Four (4) Objectors attended the hearing and presented testimony. Those Objectors present were Phyllis Robinson, Don Mattheisen, James Swigart and George Hanson. The Objectors were not represented by legal counsel and no exhibits were introduced on behalf of the Objectors.

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Montana Department of Natural Resources and Conservation personnel present at the hearing were Arlin Krogstad, Hearing Representative; Roger Noble, Geologist; James Rehbein, Kalispell Water Rights Bureau Field Office Manager; and Vicki Woodrow, Hearings Reporter. The Department was not represented by legal counsel and no exhibits were introduced on behalf of the Department.

SUMMARY OF RECORD

1. On May 14, 1976, the Department received Application for Beneficial Water Use Permit No. 8022-g76LJ by Ross L. Bair to appropriate 2.22 cubic feet per second or 1,000 gallons per minute, of water not to exceed 350 acre-feet per annum in Flathead County, Montana, to be diverted by means of a well approximately 350 feet deep, at a point in the SW1/4 NE1/4 SE1/4 of Section 28, Township 30 North, Range 20 West, M.P.M., and used for new irrigation on 73 acres in Section 27, and 67 acres in Section 28, Township 30 North, Range 20 West, M.P.M., and containing a total of 140 acres, more or less, from April 15 to October 15, inclusive, of each year.

2. On April 21 and 28, and May 5, 1977, the Department caused to be duly published in the Hungry Horse News, Columbia Falls, Montana, notice of Application for Beneficial Water Use Permit No. 8022-g76LJ.

3. The Department received 27 objections to the above Application between May 3, 1977 and June 9, 1977.

4. A hearing in the above matter was held in Kalispell, Montana, on October 26, 1977, before William F. Throm, Hearing Examiner.

5. On March 31, 1978, a Proposed Order directing the Department to issue a Temporary Permit to the Applicant was issued.

6. On June 12, 1978, a Final Order was issued by the Department granting a Temporary Permit to the Applicant with an expiration date of October 31, 1979.

PROPOSED FINDINGS OF FACT

Based on the transcript of the hearing and the information contained in the Department's file on this matter, it is found:

1. That the Applicant has been appropriating 600 gallons per minute from a well approximately 293 feet deep.

2. That the water is used for irrigation purposes on 63 acres in the W1/2 of the SW1/4 of Section 27, and 57 acres in the E1/2 of the SE1/4 of Section 28, Township 30 North, Range 20 West, M.P.M., for a total of 120 acres.

3. That the Objector, Mr. James Swigart, has lowered the pump in his well approximately 9 feet due to the loss of pressure in his well.

4. That the other Objectors to the above Application apparently have not observed any adverse affects on their diversion systems due to the Applicant's pumping.

5. That the Applicant does not have a measuring device on his pumping well.

6. That the Applicant pumps from the well up to 18 hours per day during the irrigation season.

7. That the predicted drawdown in the well of Mr. Swigart would be 12 and one-half feet after 16 hours of pumping from the Applicant's well. Therefore, with the 9 foot lowering of the pump in the Applicant's well, if the Applicant's pumping period is restricted to 16 hours per day, there should be no adverse affect to the Objector.

8. That the proposed means of diversion or construction are adequate.

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9. That the proposed use of water for irrigation is a beneficial use.

10. That there are no other planned uses or developments for which permits have been issued or for which water has been reserved that would be unreasonably interfered with by the proposed use of the Applicant.

PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-311, MCA, 1979, states that "The department shall issue a permit if:

1. There are unappropriated waters in the source of supply:
 - a. at times when the water can be put to the use proposed by the applicant;
 - b. in the amount the applicant seeks to appropriate; and
 - c. throughout the period during which the applicant seeks to appropriate, the amount requested is available;
2. the rights of a prior appropriator will not be adversely affected;
3. the proposed means of diversion or construction are adequate;
4. the proposed use of water is a beneficial use;
5. the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; . . ."

2. Section 85-2-401 (1), MCA, states that "As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of

streamflow or the lowering of a water table, artesian pressure or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions."

3. It is concluded that there are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant; in the amount the Applicant seeks to appropriate; and throughout the period during which the Applicant seeks to appropriate, the amount requested is available.

4. It is concluded that the rights of prior appropriators will not be adversely affected by the granting of this permit, subject to certain conditions in the Proposed Order.

5. It is concluded that the proposed use of water for irrigation is a beneficial use.

6. It is concluded that the proposed means of diversion or construction are adequate.

7. It is concluded that the proposed use will not interfere unreasonably with other planned used or developments for which a permit has been issued or for which water has been reserved.

8. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have bearing on the status of claimed rights of any other party except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

Based on the Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made;

PROPOSED ORDER

1. Subject to the conditions and limitations listed below, Application for Beneficial Water Use Permit No. 8022-g76LJ by Ross L. Bair is hereby granted to appropriate 600 gallons per minute of water, not to exceed 300 acre-feet per annum, in Flathead County, Montana, to be diverted by means of a well approximately 293 feet deep at a point in the SW1/4 NE1/4 SE1/4 of Section 28, Township 30 North, Range 20 West, M.P.M., and used for new irrigation on 63 acres in the W1/2 SW1/4 of Section 27, and 57 acres in the E1/2 SE1/4 of Section 28, Township 30 North, Range 20 West, M.P.M., for a total of 120 acres, more or less, from April 15 to October 15, inclusive, of each year.

2. Provisional Permit No. 8022-g76LJ is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana law.

3. The Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all the waters diverted including the period of time and shall submit said records to the Department upon request.

4. The Permittee shall limit his diversion of water from the well to a maximum of 16 hours per day.

5. The issuance of this Provisional Permit by the Department in no way reduces the Permittee's liability for damages caused by the Permittee's exercise of this Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Provisional Permit.

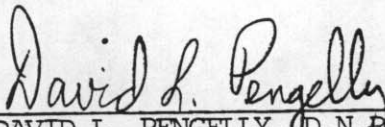
NOTICE

This Proposed Order is offered for the review and comment of all parties of record. The review and comment period shall commence with the service of this Proposed Order and shall end ten (10) days thereafter. No extensions of time for comment will be granted.

The Final Order in this matter will be sent to all parties by certified mail.

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 16th day of September, 1980.



DAVID L. PENGELLY, D.N.E.&C.
HEARING EXAMINER

BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT)
NO. 8022-g76LJ BY ROSS L. BAIR)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on October 26, 1977, at Kalispell, Montana, for the purpose of hearing objections to the above-named Application for Beneficial Water Use Permit, William F. Throm, Hearing Examiner, presiding.

The Applicant, Ross L. Bair, appeared at the hearing and presented testimony in support of his application. Mr. Bair was not represented by legal counsel nor did he introduce any exhibits supporting the application. In addition to Mr. Bair's testimony, Mr. Howard White presented testimony on behalf of the Applicant.

Twenty Objectors attended the hearing to present testimony or statements. The Objectors were not represented by legal counsel and did not introduce exhibits supporting their objections. Objectors present were Stuart F. Sorensen, John B. Pettit, Mrs. Raymond L. Bartlett, Henry J. Burns, A.L. Hamilton, Ms. Phyllis Robinson, Richard W. Robinson, Thomas O. Taylor, Henry G. Casterline, James and Margaret Swigart, Mrs. Heinz Irriger, Wilbur A. and Arlisle A. Halberg, Mrs. Arlene E. Launer, Mrs. Nestor Framness, Lester C. Reynolds, Mrs. Sylvia L. Hatten, and Mr. and Mrs. Donald G. Mattheisen, and Jerry Peters.

Mr. Steve White, Department of Natural Resources and Conservation Geologist and Mr. Jim Rehbein, Manager, Kalispell Field Office, Water Rights Bureau, attended the hearing and presented testimony on behalf of the Department. No exhibits were introduced by the Department. The Department

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was not represented by legal counsel.

PROPOSED FINDINGS OF FACT

1. On May 14, 1976, the Department received an Application for Beneficial Water Use Permit No. 8022-g76LJ by Ross L. Bair to appropriate 2.22 cfs or 1,000 gallons of water per minute not to exceed 350 acre-feet per annum in Flathead County, Montana, to be diverted by means of a well approximately 350 feet deep, at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, Township 30 North, Range 20 West, M.P.M., and used for new irrigation on 73 acres in Section 27, and 67 acres in Section 28, Township 30 North, Range 20 West, M.P.M., and containing a total of 140 acres, more or less, from April 15 to October 15, inclusive, of each year.

2. On April 21 and 28, and May 5, 1977, the Department caused to be duly published in the Hungry Horse News, Columbia Falls, Montana, notice of the above Application for Beneficial Water Use Permit No. 8022-g76LJ.

3. The Department received objections to the application as follows:

May 3, 1977 from LeRoy and Elizabeth Jean Baker

May 16, 1977 from Donald Mattheisen

May 23, 1977 from Donald R. and Sylvia L. Hatten

May 31, 1977 from James and Margaret Swigart

June 2, 1977 from Heinz Irriger

June 3, 1977 from Lester C. and Phyllis M. Reynolds

June 3, 1977 from Mr. and Mrs. George T. Hanson

June 6, 1977 from Larry E. Baker

June 6, 1977 from Elwood T. and Faith A. Newman

June 7, 1977 from Nestor Framness

June 7, 1977 from Carl and Arlene E. Launer

June 7, 1977 from Wilbur A. and Arlisle A. Halberg

June 8, 1977 from Henry G. Casterline

June 8, 1977 from John Barton Pettit

June 8, 1977 from Mr. and Mrs. R.R. Hatfield

June 8, 1977 from Stuart F. and Margaret J. Sorensen

June 9, 1977 from Leona H. Stout

June 9, 1977 from Richard W. Robinson

June 9, 1977 from Phyllis Robinson

June 9, 1977 from Thomas O. Taylor

June 9, 1977 from Raymond L. Bartlett

June 9, 1977 from Mr. and Mrs. A.L. Hamilton

June 9, 1977 from Henry J. Burns

June 9, 1977 from Delbert Smith

June 9, 1977 from Ernest and Edna Johnson

June 9, 1977 from Columbia Meadows Water Users No. 3 (by Robert McClanahan, President)

June 9, 1977 from Columbia Meadows Water Users No. 4 (by Marles Reynolds, President).

4. The Applicant started construction on the ground water appropriation in May of 1976 and completed it in July, 1976 without a Beneficial Water Use Permit.

5. Water has been appropriated from the ground water source at the rate of 600 gpm, by means of a well consisting of a 12 inch casing placed to a depth of 293 feet and perforated from the 150 foot depth to the 290 foot depth and used for irrigation purposes since the date of completion.

6. The Applicant, according to his own testimony, has not and does not intend to appropriate more than 600 gallons of water per minute for the beneficial use applied for in Application No. 8022-g76LJ, the subject matter of this hearing, and does not intend to irrigate more than 120 acres for a beneficial use requirement of not to exceed 300 acre-feet per annum.

7. The Objectors have experienced deteriorating water quality and

water quantity problems in their wells allegedly associated with the Applicant's ground water withdrawals.

8. The Objectors' ground water problems have occurred simultaneously with droughty conditions in the area and the Applicant's ground water withdrawals. Data is lacking to determine whether or not the Applicant's and the Objectors' sources of supply are from the same aquifer and is insufficient to show a correlation between the Applicant's ground water withdrawals and the adverse affects to the Objectors' ground water supplies. Such a determination cannot be made with any degree of reliability without further ground water studies including a monitoring program to correlate the affects of this withdrawal, if any, on other existing ground water developments in the area.

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a Beneficial Water Use Permit is required by the Applicant to appropriate water from the source of supply.

2. The Applicant did commence construction of the ground water withdrawal and distribution works and did appropriate ground water at a rate of 100 gpm or more without first applying for and receiving a permit from the Department and is, therefore, in violation of Section 89-880, R.C.M. 1947, of the Montana Water Laws.

3. Some of the Objectors, if not all, have apparent prior existing water rights from the source of supply which, by law, must be protected, however, the quantification and the final determination of the validity of such rights must await the adjudication process mandated by Section 89-870 et seq., of the Montana Use Act, and any permits issued must be subject to that final determination.

4. The rights of prior appropriators will not be adversely affected

if the permit is conditioned so as to protect those rights.

5. The proposed means of diversion or construction is adequate.

6. The proposed use of water is a beneficial use.

7. The proposed use will not interfere unreasonably with other planned uses or developments for which this permit has been issued or for which water has been reserved.

8. The Application for Beneficial Water Use Permit No. 8022-g76LJ by Ross L. Bair may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

PROPOSED ORDER

1. Subject to the conditions cited below, the Application for Beneficial Water Use Permit No. 8022-g76LJ by Ross L. Bair is hereby granted to appropriate 1.34 cubic feet of water per second or 600 gpm, and not to exceed 300 acre-feet per annum in Flathead County, Montana, to be diverted by means of a well approximately 293 feet deep at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, Township 30 North, Range 20 West, M.P.M., and used for new irrigation on 63 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 27 and 57 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 28, Township 30 North, Range 20 West, M.P.M., for a total of 120 acres more or less from April 15 to October 15, inclusive, of each year.

2. The permit is temporary and is subject to all prior existing water rights in the source of supply including prior decreed rights, if any, and not necessarily limited to all existing water rights of those objecting herein, and subject to any final determination of prior existing water rights, as provided by Montana Law.

3. The Temporary Permit is subject to the following additional conditions:

a. The Temporary Permit shall terminate on October 31,

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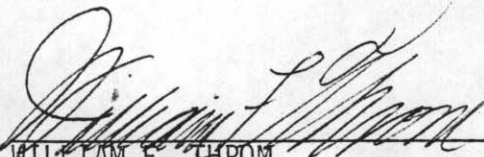
1979 unless terminated sooner by Department Order.

- b. The Permittee and Objectors shall cooperate with the Department in conducting a monitoring program of potentially affected wells in the area. The monitoring program will be conducted by the Department. Should the Department conclude that prior appropriators are being unreasonably adversely affected by the appropriation, the Temporary Permit shall be further conditioned or revoked as determined necessary.
- c. After completion of the monitoring program, a Provisional Permit may be granted by the Department subject to conditions dictated by the results of the monitoring program.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be mailed to the Department within ten (10) days after receipt of service of the Proposal for Decision upon parties herein. No extensions of time for filing exceptions will be granted. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 31st of March, 1978.


WILLIAM F. THROM
HEARING EXAMINER

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